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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HSH NORDBANK AG NEW YORK BRANCH, as :
Administrative Agent for Itself and Certain Lenders, :
Plaintiff, : Case No. 08 Civ. 6131 (GEL)
vs. :
MICHAEL SWERDLOW, BRIAN STREET, : **ANSWER AND**
and JAMES COHEN, : **AFFIRMATIVE DEFENSES**
Defendants. :
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Defendant Michael Swerdlow ("Swerdlow" or "Defendant"), as and for his
Answer to the Complaint of the HSH Nordbank AG New York Branch ("Plaintiff" or "HSH
Nordbank"), alleges as follows:

ADOPTION OF ANSWER AND AFFIRMATIVE DEFENSES

Swerdlow hereby adopts and incorporates by reference as though fully set forth
herein the Answer and Affirmative Defenses filed in this action by Defendants Brian Street and
James Cohen.

SWERDLOW'S ANSWER

In addition to the allegations made by Defendants Street and Cohen, Swerdlow alleges as follows:

8. Swerdlow admits the allegations in paragraph 8 of the Complaint.

SWERDLOW'S AFFIRMATIVE DEFENSES

In addition to the affirmative defenses pleaded by Defendants Street and Cohen, Swerdlow pleads as follows:

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE **(Failure To Allege Capacity And Standing To Sue)**

183. Swerdlow repeats and realleges Paragraphs 1 through 7 and 9 through 182 of the Answer and Affirmative Defenses of Defendants of Street and Cohen as if fully set forth herein.

184. Pursuant to Rule 9 (a) of the Federal Rules of Civil Procedure, and by way of specific negative averment, Swerdlow asserts that HSH Nordbank has failed to properly plead ultimate facts or attach documentation which evidences that it has the requisite legal capacity to maintain this action; that it has the requisite legal standing to maintain this action; and that all real parties in interest whose presence are indispensable to the adjudication of this action have commenced this action. Although HSH Nordbank, at paragraph seventeen (17) of the Complaint, alleges that the original Loan, as amended, was restructured as a "syndication" on or about November 10, 2006, and that Replacement Notes were executed in favor of six different lenders, none of those lenders other than HSH Nordbank appear as plaintiffs in this action, and HSH Nordbank instead relies on certain conclusory allegations that it has brought the action as "Administrative Agent for itself and other lenders." Moreover, although HSH Nordbank's role

as "Administrative Agent" is set forth in the original Loan documents attached to the Complaint, it is alleged that the syndication occurred subsequent to the Loan and there are no allegations that the rights and legal relationships by and between Swerdlow, Defendants Street and Cohen, Nordbank, and the other lenders are governed by the Loan documents or that the syndicated lenders adopted and affirmed Article 17 on or about the time that the Replacement Notes were executed.

185. Swerdlow is prejudiced in several respects by this failure to properly plead capacity, and by the apparent failure of the other lenders to join this action as plaintiffs, and reserves all rights to amend his pleadings upon the completion of appropriate discovery addressing the capacity and standing of HSH Nordbank to maintain this action. At the very minimum, any material alteration of the loan documents by virtue of the syndication may serve to release Swerdlow and defendants Street and Cohen from their obligations to the extent that they did not affirm such material modifications of the terms of the Loan. Moreover, the failure to have included the syndicated lenders as plaintiffs may affect the efficiency of discovery and Swerdlow reserves the right to seek extensions of applicable discovery deadlines to the extent that the lenders are uncooperative in submitting to the jurisdiction of this Court over discovery matters.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
(Failure To Allege Performance Or Occurrence Of Conditions Precedent)**

186. Swerdlow repeats and realleges Paragraphs 1 through 7 and 9 through 182 of the Answer and Affirmative Defenses of Defendants Street and Cohen as if fully set forth herein.

187. Pursuant to Rule 9 (c) of the Federal Rules of Civil Procedure, and by way of specific negative averment, Swerdlow asserts that HSH Nordbank has failed to properly plead

ultimate facts or attach documentation that evidences the performance or occurrence of all conditions precedents prior to the maintenance of this action. Specifically, it fails to allege ultimate facts that reveal that the terms of any agreement by and between the syndicated lenders was satisfied and that the syndicated lenders conferred upon HSH Nordbank the requisite legal authority to maintain this action on their behalf. Swerdlow and defendants Street and Cohen are prejudiced in several respects by this failure to properly plead the performance or occurrence of conditions precedent, and reserve all rights to amend their pleadings upon the completion of appropriate discovery.

WHEREFORE, Swerdlow respectfully demands judgment dismissing the Complaint in all respects and awarding him such other and further relief as the Court deems just and proper, including but not limited to, his attorneys' fees and costs in litigating this dispute.

Dated: New York, New York
August 29, 2008

SHUBIN & BASS, P.A.

By:



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HSH NORDBANK AG NEW YORK BRANCH, as :
Administrative Agent for Itself and Certain Lenders, :
: Case No. 08 Civ. 6131 (GEL)
Plaintiff, :
: vs. :
: **AFFIRMATION OF SERVICE**
MICHAEL SWERDLOW, BRIAN STREET, :
and JAMES COHEN, :
Defendants. :
-----X


I, John K. Shubin, declare under penalty of perjury that I have served a copy of the attached Answer and Affirmative Defenses upon:

Michael H. Barr, Esq. and Justin N. Kattan, Esq. SONNENSCHN NATH & ROSENTHAL LLP, *Attorneys for Plaintiff*, 1221 Avenue of the Americas, New York, New York 10020, and **Raymond N. Hannigan, Esq., Stephen M. Rathkopf, Esq., and David Feuerstein, Esq.,** *Attorneys for Defendants Brian Street and James Cohen*, HERRICK, FEINSTEIN LLP 2 Park Avenue, New York, NY 10016 by facsimile transmission and U.S. mail.

Dated: New York, New York
August 29, 2008

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By:



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